

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
APPEAL NO.: 17-0616**

**CARL CLARK,**

**Petitioner,**

**v.**

**KANAWHA COUNTY BOARD OF  
EDUCATION,**

**Respondent.**

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**RESPONDENT'S BRIEF**

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From the Circuit Court of Kanawha County, West Virginia  
Civil Action No. 15-C-1470

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## **ASSIGNMENTS OF ERROR**

The sole error the Petitioner (“Carl Clark”) asserts is the Circuit Court erred in granting respondent’s Motion for Judgment as a Matter of law pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure* by finding that respondent’s articulated legitimate, non-discriminatory reason for the posting of Petitioner’s job and decision not to re-hire him were “undisputed.”

## **STATEMENT OF THE CASE**

### **I. INTRODUCTION**

The reason the Honorable Judge Charles King Jr. granted a judgment as a matter of law to the KCBOE is obvious – Mr. Clark’s own admissions compelled the Court’s decision. The law and applicable West Virginia Secondary Schools Activities Commission (“WVSSAC”) policy states that KCBOE was legally required to hire “currently employed certified professional educator[s]” before all others. W. Va. Code § 18A-3-2a(e)(3) (Effective Until June 12, 2015); *see, generally, Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 496 S.E. 2d 447, at 455 (W.Va. 1997) (holding that a board of education's authority to hire an individual as a coach is restricted in some circumstances where ‘a currently employed certified professional educator’ has applied for the position”); 127 CSR 3-6.1 & 6.4.c.; *see also* WVSSAC Policy at J.A., at 205, 228. Mr. Clark himself admitted that at the time he interviewed for the Head Coach position for the Boys Basketball team at Capital High School in May, 2015, he was “not employed by the Kanawha County Board of Education.” J.A., at 210. Further, Mr. Clark also admitted that he “was not a full time educator” when he interviewed to be the Head Coach of the Capital High School Basketball Team in May of 2015. J.A., at 210. Lastly Mr. Clark admitted that he was not a “currently employed” individual in “any capacity.” J.A., at 210 (emphasis added). Thus, Mr. Clark’s own

admissions provide the clear reason why the Judge granted a judgment as a matter of law for KCBOE.

The Petitioner Carl Clark (“Mr. Clark”) retired from his fulltime teaching position at Capital High School (“Capital”) with the Respondent Kanawha County Board of Education (“KCBOE”) on October 6, 2014. J.A., at 190. Because he was no longer a “currently employed certified professional educator,” he was ineligible for a coaching position because two other “currently employed certified professional educators” did apply for the position, eliminating him from consideration. *Id.*

On August 3, 2015, Mr. Clark filed a complaint against the KCBOE asserting he was a victim of age discrimination because he was not retained to be the Head Coach of the Capital High School boys’ basketball team for the 2015-2016 school year. J.A., at 1-6. However, Clark’s allegations of discriminatory pretext are solely based on unsupported conjecture and speculation of events that are irrelevant to the legal issue. The law at the time mandated that the KCBOE could not legally re-hire Clark, absent any other “currently employed certified professional educator[s]” applying for the job. *Id.* County boards of education were required to hire “currently employed certified professional educator[s]” before all others. *Id.*; see also J.A., at 167. In this instance, two Kanawha County teachers applied for the job, each meeting the qualifications to serve as head basketball coach. Therefore, Clark’s contentions of the existence of any age-based discriminatory animus are, as the Honorable Charles E. King, Jr. ruled, unsubstantiated and wholly speculative because Clark was not a “currently employed certified professional educator” at the time, and could not be re-hired because other “currently employed certified professional educator[s]” had applied for the position. *Id.*; see also J.A., at 30, 191, 73, 196, 209-210. Any argument that the

KCBOE's decision was motivated by a discriminatory animus fails, even giving Clark the benefit of every reasonable and legitimate inference in his favor.

The trial of this matter commenced on November 14, 2016 to determine the only remaining issues in this matter: 1) Whether the Respondent, KCBOE, discriminated against Clark due to his age; and, 2) whether Clark was entitled to emotional distress damages stemming from the alleged discrimination. See *Order*, J.A., at 230. Clark presented his case in chief and rested on November 15<sup>th</sup>, 2016. J.A., at 230. Thereafter, KCBOE moved for Judgment as a Matter of Law pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure*. J.A., at 230. The Circuit Court fully heard Clark's age discrimination claim, relied upon the evidence presented in the Clark's case in chief, applied the applicable law, gave Clark the benefit of every reasonable and legitimate inference in favor to him, and assumed those facts as true which a jury might properly find under the evidence. J.A., at 233. Despite the favorable inferences the trial court is legally required to afford the Plaintiff, the Court ruled that there was no "evidence sufficient to create a triable issue of discriminatory animus or to shift the burden of persuasion to the Defendant." See *Order*, J.A., at 234. Further, the Court ruled that "the record lacks a legally sufficient evidentiary basis for a reasonable jury to find the Defendant used the Plaintiff's age as a motivating factor to post his job as open and then not to hire him for the 2015-2016 season." See *Order*, J.A., at 234-235.

## **II. EVIDENCE**

Clark served as the head coach of the Capital High School boys basketball team for 21 seasons through the end of the 2014-2015 season. J.A., at 30, 37. During the majority of that time and for multiple years prior, he served under a continuing contract of employment as a full-time teacher. J.A., at 28. However, on October 6<sup>th</sup> of the 2014-2015 school year, Clark resigned his position as a professional educator to take regular retirement. J.A., at 49, 190, 209. His retirement

was approved by the KCBOE in November, 2014. J.A., at 209. With the basketball season quickly approaching, the former principal at Capital, Clinton Giles, made the decision to allow Clark to coach the 2014-2015 season. J.A., at 30, 158-159, 192. As such, Coach Clark signed the Extra-Curricular Agreement (“Agreement”) to be the head coach for the 2014-2015 basketball season. J.A., at 192. At the conclusion of the season, and based on the terms of the Agreement, Clark was paid in full because the duties under the agreement for the 2014-2015 season were completed. J.A., at 72, 79-80, 89, 159-160, 185-186. Once paid, Clark’s employment with KCBOE ended and he was no longer an employee of KCBOE in any capacity. J.A., at 73, 76, 79-80, 89, 159-160, 185-186, 210. Clark, nevertheless, contended that he still intended to coach the 2015-2016 season; however, his retirement from teaching in October 2014 prevented KCBOE from offering him the position for another season based on the relevant law and WVASSC policy. W. Va. Code § 18A-3-2a(e)(3) (Effective Until June 12, 2015); *see, generally, Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 496 S.E. 2d 447, at 455 (W.Va. 1997); 127 CSR 3-6.1 & 6.4.c.; *see also* WVSSAC Policy at J.A., at 205, 228.

The applicable law, W.Va. Code §18A-3-2(a)(3), 127 CSE 3.6.1 and 6.4 and WVSSAC policy in effect at the time regarding the hiring of coaches required county boards of education to hire “currently employed certified professional educator[s]” before all others. *Id.* The law and policy are specifically recited in the WVSSAC Handbook as follows:

6.1 A member of a school faculty, substitute teacher or student teacher, with or without West Virginia Department of Education Authorized Certification, within a public, private, or parochial school system shall be allowed to coach an athletic team. Also, an authorized certified individual may coach if he meets all of the requirements in subsection 6.4 of this rule.

....

6.4 An authorized certified coach must meet the following requirements:

...



6.4.c The authorized certified coach may be contracted to coach only if an employed certified professional educator within the county has not applied for and accepted the coaching position.

J.A., at 64, 228. As a coach for many years under the WVSSAC, Clark, whose conduct was governed by the WVSSAC policy, was very familiar with the WVSSAC's Handbook that specifically adopts the legislatively mandated rules and statutory requirements to be a coach for a West Virginia County Board of Education. J.A., at 63, 104-105. Furthermore, as Clark was aware, coaching positions held by non-employees were advertised on a yearly basis. J.A., at 31, 60. Non-employees were eligible to fill coaching positions when no "currently employed certified professional educator[s]" applied for and accepted the coaching position. J.A., at 228.

In January 2015, in the middle of the Clark's final basketball season, the former principal, Mr. Giles, resigned his employment. J.A., at 257, 78, 131. He made the decision to allow Clark to coach after Clark's retirement from teaching for a finite period of time, i.e. to the end of the 2014-2015 basketball season. J.A., at 257, 78, 131, 192. An "acting principal," Mr. Miller, was appointed while the KCBOE searched for a new principal at Capital High School. J.A., at 30. At the conclusion of the season, Clark stated that he asked Mr. Miller to inform the new principal that he wanted to continue coaching. J.A., at 30. Furthermore, in the 2-3 days following the conclusion of the season, he told the athletic director, Cody Clay, he wanted to coach the next season. J.A., at 31. Clark then went on vacation. J.A., at 31.<sup>1</sup>

Mr. Clay was in his first year as the athletic director. J.A., at 157. At the time, Mr. Clay was unfamiliar with the rules regarding filling coaching positions. J.A., at 162. He relied on Mr. Giles to make decisions regarding the posting of available positions and hiring personnel to fill

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<sup>1</sup> Even though Clark asserts it was common knowledge he desired to return as the coach, two of his former assistants applied and interviewed for the head coach position because they believed Clark retired. J.A., at 60.

those positions. J.A., at 158-159. He had no specific knowledge about Clark's ability to continue as coach at the end of the season. J.A., at 162.

In or about April of 2015, Mr. Clay began looking to fill coaching vacancies for the 2015-2016 school year. J.A., at 182. It is important for the school administration to ensure vacancies are filled in preparation for the next school year. Filling positions is a long process that includes a 5 day advertising period, review of applications, candidate interviews, recommendations by the principal to KCBOE human resources, and recommendations to the KCBOE who ultimately makes the hiring decision at one of its 2 monthly meetings. J.A., at 122-123. The length of the process is compounded because often people don't apply for jobs so they have to be re-advertised multiple times. J.A., at 129. Additionally, in athletics, the WVSSAC provides a three (3) week period (that starts approximately the second week of June) where coaches for all sports are allowed to interact with perspective players, to conduct drills and to coach in preparation for the sports seasons in the next school year. J.A., at 40, 167. Thus, it is important that a coach be in place as soon as possible so the coach can effectively prepare for the June session and the next season. J.A., at 167, 168.

Accordingly, Mr. Clay in his role as a first year athletic director, contacted the KCBOE's human resources department to determine which positions needed to be filled for the next school year. J.A., at 161. This was done with regard to all coaching positions. J.A., at 161. He created a list of coaching vacancies based upon the information provided by human resources. J.A., at 163-164. He contacted human resources again to determine whether positions held by retired educators during the 2014-2015 school year were required to be advertised as available for the 2015-2016 school year. J.A., at 161, 181. Human resources confirmed that coaching positions held by non-employees during the 2014-2015 school year, including retired teachers, had to be posted as available for the 2015-2016 school year. J.A., at 181. Thus, Mr. Clay provided the list to his

supervisor who submitted requests to advertise multiple coaching positions to human resources to fill vacancies for the 2015-2016 school year. J.A., at 163-164, 181, 193. The Head Coach position for the Boys' Basketball Team at Capital High School was submitted for advertising, because Clark was no longer an employee of the KCBOE due to his resignation in October 2014, together with 12 other coaching positions at the school. J.A., at 179, 193, 209-210.

In his brief, Clark contends he was under a continuing contract of employment with the KCBOE until the end of the 2014-2015 school year. *Appellant's Brief*, at P. 12. However, during argument on the KCBOE's Motion for Judgment of a Matter of Law, Clark's contention was that he was entitled to the position because he filled it for multiple years prior. J.A. at 256. Irrespective of Clark's opinion regarding his employment, the trial evidence showed Mr. Clay believed Clark's temporary employment for extracurricular activities ended at the conclusion of the 2014-2015 basketball season. Mr. Clay believed that Clark's coaching position continued while he was an employed teacher; however, on retirement from teaching, Clark's duties and employment with the KCBOE terminated at the end of the basketball season. J.A., at 159-160, 178-179, 185-186. The new principal, Larry Bailey, testified that the position was vacant because Clark retired. J.A., at 79-70, 89. Their testimony is entirely consistent with the law. W. Va. Code § 18A-3-2a(e)(3) (Effective Until June 12, 2015); *see, generally, Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 496 S.E. 2d 447, at 455 (W.Va. 1997); 127 CSR 3-6.1 & 6.4.c.; *see also* WVSSAC Policy at J.A., at 205, 228. Furthermore, the Agreement executed by Clark specifically states:

Kanawha County Schools and Carl Edward Clark, Employee, mutually agree, subject to approval by the Board of Education of the County of Kanawha, that the Employee shall perform the following extra-curricular duties during the school year 2014-2015.

BOYS BASKETBALL HEAD COACH (sic) CAPITAL HIGH \$2,500.00

The following terms and conditions shall apply to this agreement:

1. Payment of compensation set forth above shall be made upon completion of duties of the extra-curricular assignment or upon such other schedule mutually agreed upon by the parties.

...

6. Employee retirement, resignation, or termination ends this contract agreement.

J.A., at 192. Clark was paid in full on March 10<sup>th</sup>, 2015, upon the completion of his duties for 2014-2015 season. J.A., at 72. He did not plead a breach of contract claim, so whatever skewed interpretation Clark had about his agreement is irrelevant. Clark produced no evidence at trial to support any other schedule that was mutually agreed upon by the parties for further activities. Additionally, when he submitted his application for the position, he specifically stated he was not “currently under contract.” J.A., at 200. More importantly, from a timing standpoint, Clark admits he was “not employed in any capacity by KCBOE” when he interviewed for the Head Coach position in April of 2015. J.A., at 103, 210. Basketball season ended in 2015, Clark, therefore, by his own admission, recognized he had no employment rights, contractually, or otherwise, with KCBOE. The following admissions foreclosed Clark from being rehired as the Boys Basketball Head Coach because two other “currently employed certified professional educator[s]” applied for the same position:

Please admit you were not an employed full time educator when you applied to be the Head Coach of the Capital High School Boys Basketball Team in April of 2015.

RESPONSE: Admit

Please admit that you were not an employed full time educator when you interviewed to be the Head Coach of the Capital High School Boys Basketball Team in May of 2015.

RESPONSE: Admit

Please admit that you were not employed in any capacity by the Kanawha County Board of Education at the time you applied for the Head Coach position of the Boys Basketball team at Capital High School in April of 2015.

RESPONSE: Admit

Please admit that you were not employed by the Kanawha County Board of Education in any capacity at the time you interviewed for the Head Coach position of the Boys Basketball team at Capital High School in May of 2015.

RESPONSE: Admit

*Id*; see also J.A., at, 210.

From April 24-April 30, 2015, the head coaching position was posted on the County Job Vacancy Hotline with 12 other coaching vacancies at Capital High School and 22 other coaching vacancies existing within the county on the Job Vacancy Hotline. J.A., at 193. The Job Vacancy Hotline specifically states:

**EQUAL OPPORTUNITY/AFFIRMATIVE ACTION EMPLOYER DISCRIMINATION PROHIBITED.**

Applicants for admission and employment, students, parents, employees, and sources of referral of applicants for admission and employment are hereby notified that the Kanawha County School District does not discriminate on the basis of race, color, religion, national origin, sex, age, or disability in admission or access to, or treatment or employment in, its programs and activities. Any person having inquiries concerning the Kanawha County School District's compliance with the regulations implementing Title IX or Section 504 is directed to contact: Title IX: Title IX Coordinator, Kanawha County Board of Education, 200 Elizabeth Street, Charleston, WV 25311-2119, phone 348-1379; Section 504: Section 504 Coordinator, Kanawha County Board of Education, 200 Elizabeth Street, Charleston, WV 25311-2119, phone 348-1366. These persons have been designated by the Kanawha County School District to coordinate the efforts to comply with the regulations implementing Title IX and Section 504.

J.A., at 194. Upon posting the position, Mr. Miller and Mr. Clay contacted Clark to notify him the position was posted as available on the Job Vacancy Hotline and that Clark had to submit an application for the position. J.A., at 35, 54-55. Clark completed and submitted the online application on April 24, 2015 – the same day the job was initially advertised.<sup>2</sup> J.A., at 43, 195-204. Clark applied for the Head Boys' Basketball Coach at Capital as well as an assistant coach's position. J.A., at 195.

On or around the last week of April 2015, the KCBOE hired the new fulltime principal, Mr. Larry Bailey, who began to serve as principal at Capital High School. J.A., at 76. He attended principal training wherein he was instructed teaching and service personnel positions had to be

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<sup>2</sup> Clark stated that was not "under any contract" on his application. J.A., at 200.

filled within 30 days of posting. He believed this also applied to coaches. J.A., at 80-81. Upon arriving at the school, one of his first duties was to fill the various teaching, service personnel, and coaching vacancies, which were advertised as available for the next school year. J.A., at 79. Human resources provided Mr. Bailey a list of applicants. J.A., at 205. Seven (7) applicants applied and interviewed for the position, including Clark. J.A., at 155. Mr. Bailey contacted his immediate supervisor to determine the best way to proceed with the interviews. J.A., at 132-133. Mr. Bailey's supervisor advised him to interview all applicants for the position. J.A., at 133. Mr. Bailey selected Athletic Director Cody Clay, Assistant Principal Mathew Shock, and Assistant Principal Abbey Stevens to sit in on interviews and assist him in the hiring decision. J.A., at 138. Each was under the age of 40. J.A., at 174.

The KCBOE held interviews for the position during the week of May 18, 2015, approximately 3 weeks after the job was advertised and more than 2 months after the basketball season concluded. J.A., at 120. There was no extraordinary rush to conduct the interviews. J.A., at 119. In fact, Mr. Miller asked that the interviews be delayed in order to allow Mr. Bailey to step into the principal's position and participate in the selection. J.A., at 130-131. Mr. Clay prepared a list of 10 questions to ask all the interviewees. J.A., at 36, 204. The questions were drafted based upon a hypothetical candidate in order to determine the best candidate for the position. J.A., at 170. The list of questions was then provided to all 4 members of the interview committee to be asked during the interview of each candidate. J.A., at 87. The committee asked all the applicants the same ten questions, all from the list prepared by the Athletic Director, with the exception of question number nine (9) which stated: "(If Applicable) Understanding that this position is not your professional job; how will you be able to balance the workload that comes along with being a head coach and maintaining a standard of excellence as an educator?" J.A., at 87. Question

number one (1), which the committee asked all applicants, stated: “What are your career goals as a basketball Coach? Where do you see yourself in five years? What kind of commitment can you give us if you were given this position?” J.A., at 170.

Prior to the interview, human resources provided the hiring committee with only the applicants’ names. J.A., at 154. The interviewers were not provided the candidates’ ages prior to the interviews. J.A., at 175. The only other information provided to the interviewers was the information the candidates brought to the interviews themselves or through responding to the interview questions. J.A., at 154. Clark attended his interview and answered the questions presented from the list of pre-approved questions. J.A., at 36. Clark’s interview was not the best of all the candidates. J.A., at 109. In particular, Question No. 2 stated: “What do you think sets you apart, coaching wise, from other candidates?” J.A., at 204. Clark’s response was that his record speaks for itself without elaborating. J.A., at 69. Matthew Greene, a full time teacher at Capital High School, interviewed for the position and answered all of the pre-approved questions. J.A., at 110. According to the committee, Mr. Greene appeared enthusiastic about the program and presented the committee with a packet outlining his vision for the program. J.A., at 110, 155. There is nothing in the record to show that Mr. Bailey or Mr. Clay could have had any predetermined preference for the position. Mr. Bailey never met or spoke to Clark or Mr. Greene prior to the interviews. J.A., at 61, 96. Additionally, Mr. Clay had no knowledge Mr. Greene was interested in the position until after it was advertised as vacant. J.A., at 169.

After the conclusion of all the interviews, the committee discussed the candidates and filling the position. J.A., at 120. Mr. Bailey was objective while trying to follow the law and WVSSAC policy. *Id*; *see also* J.A., at 64, 89. The committee understood that “currently employed certified professional educator[s]” who applied for an open coaching position had the right of first

refusal for the desired coaching position. *Id*; *see also* J.A., at 228, 64, 92. Mr. Bailey had some confusion over the rule because he believed preference or priority went to the candidate that was an employed teacher within the school because they have better access to the students. J.A., at 92, 108-109. Regardless, the committee determined the position had to first be offered to a “currently employed certified professional educator” that applied for the position. *Id*; *see also* J.A., at 228, 64, 92, 93. The committee also believed there was potential for future personnel grievances or lawsuits that may occur if a vacant coaching position was not first offered to a “currently employed certified professional educator” that applied for the position. *Id*; *see also* J.A., at 228, 64, 65. As stated throughout, Clark was not a “currently employed certified professional educator” because he resigned as a teacher in October 2014 to take full retirement. *Id*; *see also* J.A., at 64, 30, 73, 191, 196, 209-210.

As such, the committee offered the position to Matthew Greene, who was a “currently employed certified professional educator” at Capital High School. *Id*; *see also* J.A., 64, 106. If Mr. Greene had not accepted the offer, the committee wanted to offer the position to Mr. McGinnis. Mr. McGinnis had been a long term coach and teacher, as well as one of the top one hundred coaches in the state. J.A., at 111. However, Mr. McGinnis informed the committee he was retired. J.A., at 110-111. Therefore, Ron Beatty, a “currently employed certified professional educator” at another school, would have been offered the role as next in line for the position. *Id*; *see also* J.A., at 106. Clark could not have been offered the position unless both Mr. Greene and Mr. Beatty declined the offer. J.A., at 106, 107, 228. On or about June 1, 2015, Mr. Bailey submitted his request to hire Matthew Greene to be the Head Coach of the Capital High School Boys’ Basketball Team for the 2015-2016 season. J.A., at 213. At the time the request to hire was submitted to the board, Mr. Greene was 35 years old. J.A., at 174. None of the administrators at Capital considered



age in the process. J.A., at 112, 154, 174. Mr. Greene was formally approved by the board to become the head coach on June 8, 2015. J.A., at 220. Mr. Greene was retained to fill the position along with 7 other coaching positions at Capital<sup>3</sup>, and 30 other coaching positions across the county. J.A., at 220-221. Thereafter, on June 12, 2015, the law requiring West Virginia county boards of education giving hiring priority for coaching positions to those “currently employed certified professional educator[s]” who applied for and accepted a coaching position was removed. *Id.*; see also J.A., at 165.

KCBOE notes that after Clark applied and interviewed for the coaching position, he applied to become a substitute teacher with the KCBOE on May 21, 2015. J.A., at 195-203. He was formally approved by the KCBOE to be a substitute on June 8, 2015, which was the same day Mr. Green was formally approved to fill the head coach position. J.A., at 44. Clark never filled a substitute teaching position once he was approved. J.A., at 211. Additionally, Mr. Bailey called Clark sometime after his interview to fill one of the available assistant basketball coaching positions. J.A., at 57-58. While Clark contends it was insulting to offer him a position on the team as an assistant coach, he clearly applied for the position and Mr. Bailey offered him the opportunity to continue working with the team. J.A., at 57-58, 195. However, Clark refused the opportunity. J.A., at 57-58. Additionally, an assistant football coach position held by a retired teacher was also advertised that year. J.A., at 128-129. In that instance, the retired teacher was able to retain the position because no “currently employed certified professional educator” applied for the position. *Id.*

## SUMMARY OF ARGUMENT

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<sup>3</sup> Clark asserted all 8 coaching positions filled at Capital on June 8, 2015 were filled by individuals under the age of 40. However, there is no evidence in the record, nor was there any evidence presented to the Court to support this statement. KCBOE only stipulated that “the newly hired coaches and assistant coaches of the Capital High School boys’ basketball team for the 2015-2016 season are all under the age of 40.” J.A., at 229.

Mr. Clark's retirement from teaching in October 2014 is the reason he was unable to be the head coach of Capital's boys' basketball team for the 2015-2016 season. There is no evidence to support a finding the KCBOE acted with a discriminatory motive in hiring a new head coach of the Capital High School boys' basketball team for the 2015-2016 season. It is undisputed that Clark resigned his fulltime teaching position to take retirement in October, 2014. It is undisputed Mr. Giles allowed Clark to coach the 2014-2015 season. It is undisputed Clark completed the season and was paid in full on March, 10<sup>th</sup>, 2015. It is undisputed that Clark was not an employee of the KCBOE in any capacity when he applied to be the head coach for the next season in April, 2015. It is undisputed the law in April 2015 required the county boards of education to give priority for coaching positions to "currently employed certified professional educator[s]" before all others. *Id*; *see also* J.A., at 228, 64. It is undisputed the KCBOE hired a "currently employed certified professional educator" to serve as the head coach of the boys' basketball team for the 2015-2016 season. *Id*.

The record is void of any evidence of discriminatory motive by the KCBOE in advertising the position as vacant in April 2015. Furthermore, the record is void of any evidence of age entering the decision process in choosing a younger candidate. The record clearly demonstrates the KCBOE acted pursuant to applicable law governing the hiring of coaches. *Id*; *see also* J.A., at 64. Specifically, the Circuit Court correctly found Clark presented no evidence demonstrating the advertisement of the job position and the hiring process thereafter was motivated by Clark's age. The Court in denying summary judgment gave Clark the benefit of the doubt of an alleged discriminatory motive behind the KCBOE's actions. However, the evidence presented at trial clearly demonstrated that KCBOE's decision not to re-hire Clark for the 2015-2016 basketball season was based on legitimate non-discriminatory reasons because two other "currently employed

certified professional educator[s]” applied for and one accepted the position. Accordingly, the *Order* granting judgment as a matter of law should be affirmed.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument of this matter is not required because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

### **STANDARD OF REVIEW AND ARGUMENT**

The Supreme Court of Appeals of the State of West Virginia applies a *de novo* standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law. After considering the evidence in the light most favorable to the non-movant party, it will sustain the granting or denial of a pre-verdict or post-verdict motion for judgment as a matter of law when only one reasonable conclusion as to the verdict can be reached. *Gillingham v. Stephenson*, 209 W. Va. 741, 744, 551 S.E.2d 663, 666, (2001). On appeal, the Supreme Court, after considering the evidence in the light most favorable to the non-movant party, will sustain the granting of directed verdict when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed. The question for the Supreme Court is not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict. *Brannon v. Riffle*, 197 W. Va. 97, 98, 475 S.E.2d 97, 98, (1996).

Clark’s brief attempts to intertwine a summary judgment standard pursuant to Rule 56(c) of the *West Virginia Rules of Civil Procedure* with the applicable standard for Judgment as a Matter of Law at issue in this appeal under rule 50(a). However, Clark’s ability to prevail at the summary

judgment stage is not dispositive as to whether a circuit court may grant the KCBOE's Motion for Judgment as a Matter of Law at the conclusion of Clark's case in chief. "Even if the trial judge is of the opinion to direct a verdict, he should nevertheless ordinarily hear evidence and, upon a trial, direct a verdict rather than try the case in advance on a motion for summary judgment." Syl. Pt. 7, *Poling v. Pre-Paid Legal Servs.*, 212 W. Va. 589, 592, 575 S.E.2d 199, 202 (2002); Syl. Pt. 1, *Masinter v. WEBCO Co.*, 164 W.Va. 241, 262 S.E.2d 433 (1980).

The Federal Courts provide further persuasive authority on this issue. Summary judgment should be denied "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887, 96 L. Ed. 666, 72 S. Ct. 178 (1951). Nor is summary judgment proper where the judge believes he will have to direct a verdict for one party or the other on issues that have been raised, since he should ordinarily hear evidence and direct a verdict rather than attempt to try the case in advance on a motion for summary judgment. *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir. 1951); *Lewis v. Coleman*, 257 F. Supp. 38, 40 (S.D. W. Va. 1966).

Appellate courts have upheld similar cases on a directed verdict standard before. The West Virginia Supreme Court of Appeals and the United States Court of Appeals for the Fourth Circuit have both affirmed a lower court's entry of a directed verdict in employment cases. *See Hill v. Pitt-Ohio Express, Inc.*, 1992 U.S. App. LEXIS 18485 (4<sup>th</sup> Circ. July 7, 1992); *Bostic v. Russell Cnty. Sch. Bd.*, No. 91-1644, 1992 U.S. App. LEXIS 17377 (4th Cir. July 24, 1992); *Pleasant v. Elk Run Coal Co.*, 199 W. Va. 629, 486 S.E.2d 798, 1997 W. Va. LEXIS 108.

In *Hill*, the appellant alleged she was wrongfully discharged and filed an action under the Age Discrimination in Employment Act and W. Va. Code § 5-11-9. *Hill v. Pitt-Ohio Express, Inc.*, 1992 U.S. App. LEXIS 18485 (4th Circ. July 7, 1992). The Fourth Circuit held that the truck driver

failed to show "a scintilla of evidence" that age or health played a role in the employer's decision. *Id.* Because the appellant "failed to create a genuine issue of material fact as to whether the employer's reason for discharge was pre-textual," the Court upheld the directed verdict. *Id.* In *Bostic*, the teacher brought an action for constructive discharge and retaliation. *Bostic v. Russell Cnty. Sch. Bd.*, No. 91-1644, 1992 U.S. App. LEXIS 17377 (4th Cir. July 24, 1992). The Fourth Circuit upheld a directed verdict in favor of the employer because, again, the teacher provided "insufficient evidence" to uphold her employment claim.

Lastly, in *Pleasant*, the employee contended she was discharged without cause, but the circuit court granted a directed verdict in favor of the employer. *Pleasant v. Elk Run Coal Co.*, 199 W. Va. 629, 486 S.E.2d 798 (1997). On appeal, the West Virginia Supreme Court of Appeals upheld the directed verdict in favor of the employer because the employee, even after presenting her entire case in chief, did not provide sufficient evidence for a jury to find in her favor. The Court held that "[w]hen a plaintiff's evidence, considered in the light most favorable to him, fails to establish a prima facie right of recovery, a trial court should direct a verdict in favor of the defendant." *See id.* at 630, 799. All of these cases present examples of an appellate court upholding a directed verdict if a plaintiff could not provide enough evidence in order to allow the entire case to proceed in front of a jury. Similarly, here, this Court should sustain the directed verdict granted in the *Order* because only one reasonable conclusion as to the verdict can be reached. No evidentiary basis existed to demonstrate that Clark was discriminated against based on his age. On the contrary, KCBOE followed the law and WVSSAC policy during the hiring process. W. Va. Code § 18A-3-2a(e)(3) (Effective Until June 12, 2015); *see, generally, Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 496 S.E. 2d 447, at 455 (W.Va. 1997); 127 CSR 3-6.1 & 6.4.c.; *see also* WVSSAC Policy at J.A., at 205, 228.

**A. The Circuit Court did not err in granting KCBOE's Motion for Judgment as a Matter of Law because there was no evidence demonstrating age was a motivating factor in its hiring decision and further, there were legitimate non-discriminatory reasons that resulted in another candidate being chosen for the position.**

The Circuit Court correctly found there is no legally sufficient evidentiary basis for a reasonable jury to find in favor of Clark on his claim of age discrimination. Rule 50(a) of the West Virginia Rules of Civil Procedure states as follows:

**Judgment as a Matter of Law.**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

In making its ruling:

When a motion is made for a directed verdict, the court should entertain every reasonable and legitimate inference favorable to the litigant opposing such motion fairly arising from the evidence, considered as a whole, and assume as true those facts which a jury might properly find under the evidence.

Syl. Pt. 1, *Lambert v. Goodman*, 147 W. Va. 513, 514, 129 S.E.2d 138, 139 (1963). The Court relied upon the evidence presented and the applicable law. Further, the Court gave Clark the benefit of every reasonable and legitimate inference favorable to him and assumed those facts which a jury might properly find under the evidence. J.A., at 230-236. Based upon these standards and the evidence presented at trial, the Court correctly granted KCBOE's Motion for Judgment as a Matter of Law because there is no evidence demonstrating a violation of the WV Human Rights Act, W. Va. Code § 5-11-1. et. seq.

**1. There is no evidence to demonstrate the KCBOE used Clark's age as a motivating factor in hiring a boys' basketball coach at Capital High School for the 2015-2016 season.**

Clark did not present any evidence that the KCBOE used his age as a motivating factor in its decision not to hire him as the Head Coach for the Capital High School Boys' Basketball Team for the 2015-2016 season. According to the Supreme Court:

[A] plaintiff bears the burden of proving by a preponderance of the evidence that the alleged forbidden bias was a motivating factor in the defendant's decision to take an adverse action against the plaintiff. If the plaintiff carries that burden, then the jury should find for the plaintiff unless the defendant can prove by a preponderance of the evidence that it would have taken the same action in the absence of the impermissible motive.

*See Barlow v. Hester Indus.*, 198 W. Va. 118, 135-136, 479 S.E.2d 628, 645-646 (1996).

Furthermore:

[A] plaintiff can prevail, even though [he] has not proven pretext, if she has otherwise shown that a prohibited bias entered into the defendant's decision. In that context, the mixed motive case, the defendant has acted for unlawful as well as lawful reasons, and we have accordingly shifted the burden of persuasion on the issue of causation to the defendant and required it, to avoid liability, to prove the same decision would have been made in the absence of the unlawful reason.

*See id.* at 138,648; citing to *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561 (1996); *Barefoot v. Sundale Nursing Home*, 193 W. Va 475, n. 16, 457 S.E.2d 152, n. 16 (1995). The law also provides that an employer has a right to make employment decisions for good reasons, bad reasons, or no reason at all, absent discrimination. *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561 (1996). In this case, KCBOE made an employment decision absent any discrimination, as emphasized in the *Order* multiple times. J.A. at 234-235.

In April of 2015, KCBOE was limited in its ability to fill coaching vacancies. According to the Code of State Regulations in effect at the time:

6.1 A member of a school faculty, substitute teacher or student teacher, with or without West Virginia Department of Education Authorized Certification, within a public, private,

or parochial school system shall be allowed to coach an athletic team. Also, an authorized certified individual may coach if he meets all of the requirements in subsection 6.4 of this rule.

....

6.4 An authorized certified coach must meet the following requirements:

...

6.4.c The authorized certified coach may be contracted to coach only if an employed certified professional educator within the county has not applied for an accepted the coaching position.

127 CSR 3-6.1 & 6.4.c.; *see, generally, Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 496 S.E. 2d 447, at 455 (W.Va. 1997) (A “board of education’s authority to hire an individual as a coach is restricted where ‘a currently employed certified professional educator’ has applied for the position.”) This rule was derived from *W. Va. Code* § 18A-3-2a(e)(3) (Effective Until June 12, 2015) which stated that the “State Superintendent may issue certificates for persons to serve in the public schools as athletic coaches...subject to the following limitations.” The person must be “employed under a contract with the county board of education”<sup>4</sup> and a “currently employed certified professional educator” has not applied for the position.”<sup>5</sup> *W. Va. Code* § 18A-3-2a(e)(3)(B) (Effective Until June 12, 2015). These requirements are recited verbatim in the WSSAC’s Handbook at p. 34. J.A., at 228. This legislative rule was the rule of law as adopted by the West Virginia State Legislature in March/April 2015. *See Findley v. State Farm Mut. Auto. Ins. Co.*, 576 S.E.2d 807, 819 (W. Va. 2002); *W. Va. Code* § 2-2-10(bb) (1998) (Repl. Vol. 2002).

The evidence presented in Clark’s case in chief demonstrated the KCBOE acted pursuant to the applicable law. 127 CSR 3-6.1 & 6.4.c.; *W. Va. Code* § 18A-3-2a(e)(3) (Effective Until June 12, 2015); *see, generally, Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 496 S.E. 2d 447, at 455 (W.Va. 1997) ; J.A., at 228, 64. The first year athletic director, Cody Clay, was

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<sup>4</sup> Clark stated on his application that was not “under any contract.” J.A., at 200.

<sup>5</sup> Two other “currently employed certified professional educator[s]” had applied for the position. J.A., at 106.



not involved in the decision making process for hiring coaches for the 2014-2015 seasons. Instead, he relied upon the former principal, Mr. Giles, to make those decisions.<sup>6</sup> J.A. at 158-159, 162. In preparation for the 2015-2016 school year, as the athletic director working under a temporary “acting principal,” Mr. Miller, he felt it was his duty to make sure the school was prepared for the next school year. J.A. at 179, 182. As such, he consulted the KC BOE’s human resources department to determine which positions needed to be advertised in preparation for the next school year. J.A., at 161. Human resources informed him that all positions held by persons that were not a professional fulltime teacher needed to be advertised. J.A. at 161, 163. Based on the criteria he received from human resources, he reviewed all the coaching positions at Capital to determine which needed to be filled for the next school year. J.A. at 161. The athletic director requested further clarification regarding whether coaching positions held by retired teachers were also required to be advertised, without mentioning Clark’s name. J.A., at 163, 181-182. Again, human resources confirmed this was the case. J.A., at 163. As such, Mr. Clay made a list of multiple coaching positions that fit the criteria provided by human resources and gave the list to his supervisor to be submitted to human resources to be filled in preparation for the next school year. J.A., at 163-164. Clark was notified the boys’ basketball head coach position fit this criteria so he could apply. J.A., at 164.

After the positions were posted as available, KCBOE hired its new principal at Capital High School, Larry Bailey. J.A., at 78. Mr. Bailey was inundated with multiple positions that needed to be filled in preparation for the next school year, including teachers, service personnel and coaches. J.A. at 76. He just attended principal training wherein he was instructed that teachers and service personnel positions needed to be filled within 30 days of being advertised. J.A. at 80.

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<sup>6</sup> Mr. Clay’s only involvement was to provide Mr. Clark with a copy of the Agreement pursuant to Mr. Giles directive. J. A., at 160-161.

He mistakenly believed this applied to coaching positions as well. This mistake, however, is not evidence of a discriminatory motive to not re-hire Clark based on his age. J.A. at 80. Further, the principal was also aware that the athletic director needed to get the coaching positions filled as part of his responsibilities and to make sure coaches for the 2015-2016 athletic seasons were on board for the 3 week period in the middle of June when coaches are allowed to work with their athletes to prepare for the next season. J.A. at 167. Accordingly, Bailey contacted his supervisor, Mark Milam, at the KCBOE to determine the best way to proceed. J.A., at 122,132-133. He was advised to put together a committee and interview all the candidates. J.A. at 164. This demonstrates the principal sought guidance on the process. His testimony completely contradicts any inference of a discriminatory motive.

The athletic director put together a list of 10 questions for use in the interviews of the applicants. J.A., at 87, 169. The questions were put together based upon a hypothetical candidate in order to evaluate the best candidate to fill the position. J.A. at 115, 170. Mr. Clay had no knowledge of who the applicants would be when the questions were written. J.A. at 177. The applicants were called in for interviews. J.A., at 119-120. Each applicant was asked the same 10 questions. J.A. 154. No candidate was asked their age. J.A. at 154. The committee had no information to evaluate the candidates other than the information given in the interview. J.A. 153-154. Clark did not give a good interview. J.A. at 116. Mathew Greene, on the other hand, came into the interview and impressed the committee with a written plan for the direction of the program. J.A. at 109-110.

At the conclusion of the interviews, the committee discussed their options. J.A., at 120. The process was not rushed and they took their time. J.A. at 119, 153. Mr. Bailey testified it was his goal to be objective, and follow the law and WVSSAC policy. W. Va. Code § 18A-3-2a(e)(3)

(Effective Until June 12, 2015); *see, generally, Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 496 S.E. 2d 447, at 455 (W.Va. 1997); 127 CSR 3-6.1 & 6.4.c.; *see also* WVSSAC Policy at J.A., at 205, 228; J.A., at 228, 64, 89. It was determined the position must be offered to a “currently employed certified professional educator” that applied for the position first. W. Va. Code § 18A-3-2a(e)(3) (Effective Until June 12, 2015); *see, generally, Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 496 S.E. 2d 447, at 455 (W.Va. 1997); 127 CSR 3-6.1 & 6.4.c.; J.A., at 228, 64, 121. Clark was no longer a “currently employed certified professional educator” due to his retirement in October, 2014. *Id*; *see also* J.A. at 190. Matthew Greene and Ron Beatty were the two “currently employed certified professional educator[s]” that applied for the position. *Id*; *see also* J.A., at 106. Mr. Greene came into the interview, provided everyone in the interview with a written plan for how he would run the program if given the opportunity, and gave in-depth answers to the questions posed. J.A., at 109-110. He gave a better interview than Mr. Beatty. J.A., at 109. Additionally, the committee interviewed Pat McGinnis, who was also a retired teacher. J.A., at 111-112. Mr. Bailey testified that Mr. McGinnis impressed the committee with his coaching history and the decision would have been a close call between Mr. Greene and Mr. McGinnis. J.A., 111-112. However, Mr. McGinnis informed the committee he was retired. J.A., at 111. Consequently, the position was offered to Matthew Greene, a 35 year old teacher currently employed at Capital High School. J.A., at 112-113. Mr. Bailey contacted his supervisor to confirm he followed the appropriate policies in selecting Mr. Greene. J.A. at 122, 132-133. Age was never a factor in selecting Mr. Greene. J.A., at 112, 155, 174.

Additionally, even if Mr. Greene turned down the position, the KCBOE was still required by law to offer the position to the other “currently employed certified professional educator” that applied for the position, Ron Beatty. *Id*; *see also* J.A., at 64, 106-107. The only scenario provided

by law under which Clark could serve as the coach was as an “authorized certified” individual. 127 CSR 3-6.1. However, the authorized certified coach may be contracted to coach only if a “currently employed certified professional educator” within the county has not applied for and accepted the position. *Id.* The evidence at trial clearly demonstrated that two currently employed certified professional educators applied for the position: Matthew Greene and Ron Beatty. J.A., at 109. Thus, KCBOE was required by law to offer the Head Coach position to these two candidates first. *Id.* If neither of these candidates accepted the position, the committee could have offered the position to Clark. However, even under this scenario, the evidence showed the committee was also impressed with another retired teacher Pat McGinnis, who might’ve been hired over Clark. J.A., at 110-111. Regardless, pursuant to W. Va. Code 18A-3-2a(e)(3) & 127 CSR 3-6.1, the position was offered to Matthew Greene, who ultimately accepted the position. Thus, even if some remote evidence existed in this matter that shows a prohibited bias entered into the KCBOE’s decision, the evidence shows without a doubt KCBOE would not have hired Clark for the 2015-2016 season regardless of bias because of the applicable law. 127 CSR 3-6.1 & 6.4.c.; W. Va. Code § 18A-3-2a(e)(3) (Effective Until June 12, 2015); *see* Syl. Pt. 6, *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 78 at fn. 33, 479 S.E.2d 561, 588 (1996.); J.A., at 228, 64. The evidence presented, however, in Clark’s case in chief did not demonstrate his age was a motivating factor in KCBOE’s decision not to hire him for the 2015-2016 basketball season. Rather, the evidence showed KCBOE was limited in its choice to fill the coaching position for the 2015-2016 school year.

Additionally, even though KCBOE could not offer the head coach position to Clark, Mr. Bailey subsequently called him and offered him a position as an assistant coach. J.A., at 57-58. No employed teacher applied for the position and thus he was legally qualified to fill it. This similar scenario occurred with an assistant football coach at Capital who was also a retired teacher. J.A.,

at 128-129. The assistant football coach position was posted as available because it was held by a retired teacher. J.A., at 129. However, the retired teacher was able to retain the assistant football coach position because no “currently employed certified professional educator” applied for the position. J.A., at 129. Regardless, Clark contends this offer to remain with the team was insulting. The fact he was offered another coaching position contradicts the allegations of discrimination, but demonstrates Clark’s sense that he was entitled to remain the head basketball coach indefinitely, irrespective of the facts and law. W. Va. Code § 18A-3-2a(e)(3) (Effective Until June 12, 2015); *see, generally, Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 496 S.E. 2d 447, at 455 (W.Va. 1997); 127 CSR 3-6.1 & 6.4.c.; *see also* WVSSAC Policy at J.A., at 205, 228.

**2. There is no evidence to support Clark’s position that a reasonable jury could have found in his favor.**

Clark asserts a jury could have found that he was no longer the Head Coach because he was 68 years old at the time the new 35 year old Head Coach was hired. *Appellant’s Brief*, at P.7. Furthermore, evidence existed that Clark was under a contract until the end of the calendar school year, June 30, 2015. *Appellant’s Brief* at P.7. Additionally, he contends the athletic director Cody Clay manipulated the interview panel in multiple ways to ensure Clark was not selected. *Appellant’s Brief*, at P. 8. It is Clark’s argument that this is evidence of a discriminatory motive by the KCBOE in advertising an available job for the next school year, not postponing the advertisement an additional 2-3 months until the law changed, and/or waiting to fill the position until he became an employed teacher or the law changed removing this requirement. *Appellant’s Brief*, at P. 14-15. Clark contends a reasonable jury could find the KCBOE acted with a discriminatory motive based upon his age because it did not take these steps. *Appellant’s Brief*, at P. 15.

However, there is no evidence to support such an inference of discriminatory motive. Clark's theory is nothing more than his subjective personal opinion as to why he was not hired as the basketball coach which is insufficient to establish age discrimination. *See Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 78 at fn. 33, 479 S.E.2d 561, 588 at fn. 33 (1996). Rather, his retirement and failure to become a substitute teacher prior to the advertisement of the position in April, 2015 prevented him from being re-hired as the basketball coach for the 2015-2016 season at Capital, because other full time school personnel applied for the position. J.A., at 234.

First, Clark contends he was still the head coach when the position was posted in April 2015 and points to the Agreement. J.A., at 192. It is important to note this is not a breach of contract claim against the KCBOE and Clark never brought such a claim in this matter. J.A., at 1-6. Regardless, the agreement executed by Clark memorialized the terms under which he was to serve as the head coach for the 2014-2015 season. J.A., at 192. The agreement specifically states, "Payment of the compensation set forth above shall be made upon completion of duties of the extra-curricular assignment or upon such other schedule mutually agreed upon by the parties." J.A., at 192. These extracurricular duties were completed and final payment was made on March 10<sup>th</sup>, 2015. J.A., at 48. Clark presented no evidence at trial whatsoever demonstrating some other schedule mutually agreed upon by the parties that would have extended his contract. This was for extracurricular duties, not teaching assignments. The four corners of the contract clearly demonstrate the terms of his employment were completed.

Furthermore, Clark's argument he was a KCBOE employee after the 2014-2015 season is completely contradicted by the evidence at trial. Clark specifically admits he was no longer employed by KCBOE. J.A., at 73, 103, 210. Clark's responses to KCBOE's Requests for Admissions read into the record demonstrated he not an employee in any capacity when he applied

for the position of head coach nor when he was interviewed. *Id.* Additionally, Mr. Clark admitted in his application for employment on April 24, 2015 that he was not “currently under contract.” J.A., at 200, 210. Clark’s assistant coaches even applied for the position because they believed he was not employed. J.A., at 56.

Additionally, Mr. Clay contacted human resources to determine the criteria for coaching positions that needed to be advertised for the next school year. J.A., at 161. Mr. Clay determined the boys head basketball coaching position fit the criteria. J.A., at 161. The evidence demonstrated Mr. Clay believed Clark’s employment ended on March 10, 2015 at the conclusion of the 2014-2015 season. J.A., at 190. This testimony conclusively eliminates any age based animus. Regardless of any inference drawn by a reasonable juror regarding Clark’s argument as to whether he was still the coach in April 2015, there is absolutely no inference of age discrimination that can be drawn.

Second, Clark argues that the KCBOE, through Mr. Clay, did not have to post the position as available for the next school year in April, 2015 and should have notified him his retirement from teaching would prevent him from coaching the 2015-2016 season. *Appellant’s Brief*, at P. 7. There is no evidence in the record to support such an inference, because Clark knew the law, rules and regulations regarding preference given to full time educators. W. Va. Code § 18A-3-2a(e)(3) (Effective Until June 12, 2015); *see, generally, Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 496 S.E. 2d 447, at 455 (W.Va. 1997) ; 127 CSR 3-6.1 & 6.4.c.; *see also* WVSSAC Policy at J.A., at 205, 228; *see also* J.A., at 64. Clark was a coach for many of the approximately 40 years he served as a teacher and he admitted he was familiar with the requirements on coaches. Specifically, he was familiar with the WVSSAC Handbook that recites 127 CSR 3-6.1 & 6.4.c. regarding the requirement that faculty members who apply for a coaching position be offered the

position first. J.A., at 63-64. Furthermore, he knew that assistant's positions were posted at the end of each season because of their status as non-faculty members. J.A., at 56.

The Athletic Director, on the other hand, was serving his first year as the athletic director. J.A., at 157. The former principal resigned in the middle of the season. J.A., at 78, 131. In or about March/April 2015, the first year athletic director consulted KCBOE's human resources department to determine whether he needed to fill any coaching positions. J.A., at 163-164. The three week period when coaches are allowed to work with potential athletes for the next school year was approaching. J.A., at 167. Therefore, he wanted to make sure the school was prepared for the next year. He was advised by human resources that he needed to advertise all coaching positions for the next school year that were not held by employed teachers. J.A., at 161, 163-164. Prior to advertising, he followed up with human resources again to determine whether positions held by retired teachers were required to be posted. J.A., at 163-164. Again, human resources confirmed this is the proper procedure. J.A., at 163-164. Mr. Clay and Mr. Miller called Mr. Clark while he was in the State of Florida to advise him that the job was being posted so that he could submit an application. J.A., at 35, 54-55. Clark then submitted his application on the same day the position was posted along with 13 other athletic positions at the school.

To the extent that Clark contends Mr. Clay manipulated the process to hire a new head coach prior to the change in the law on June 12, 2015 by posting the position in order to hire a younger coach, the evidence showed the position was advertised on April 24, nearly 7-8 weeks after the conclusion of the season. *Appellant's Brief*, at 14; J.A., at 193. Additionally, the younger candidate that eventually filled the position, Mr. Greene, did not even notify Mr. Clay he was interested in the position until after the advertisement. J.A., at 169. There is simply no evidence



upon which a reasonable jury could find KCBOE acted discriminatorily by advertising the head coach position for the next school year in April 2015.

Rather, the evidence shows Clark wanted the KCBOE to make a special exception or give him special treatment. In other words, Clark wanted the KCBOE to ignore the law and withhold the head basketball coach vacancy until a period of time when the law changed to no longer requiring priority to be given to an employed certified professional educator. Clark does not provide any legal authority establishing the KCBOE was capable of holding the position, or that it had a legal duty to postpone its hiring decision until the change in the law occurred. Had the KCBOE waited or withheld the position until the law changed on June 12, 2015, it would have been unfair to those employed educators that wanted to apply for the job. J.A. at 182-183, 184, 143. Furthermore, it would be unfair to delay the process to the point where a prospective coach could not prepare for the upcoming 3 weeks session wherein coaches are allowed to work with athletes for the next season. J.A. at 182-183, 184. The KCBOE clearly would have opened itself up to potential grievances and lawsuits from those currently employed professional educator that would have applied for the position. J.A., at 143.

Clark believes the rules should not apply to him because he was the head coach. J.A. at 32. Clark's entire argument stems around the KCBOE not giving him special treatment to allow him to coach another season. Clark asserts the KCBOE should have waited until the law changed to make its decision. In other words, the KCBOE should have ignored the qualified applicants that desired to fill the position under the existing law in order to allow Clark to be rehired.

**3. There is no merit to the argument that the KCBOE selectively enforced its policy to remove the Clark from his coaching position.**

As stated above, the law in effect required the KCBOE to offer the position to a currently employed certified professional educator that applied for the position first. There is no evidence

to indicate a different result would have occurred regardless of Clark's age which would have allowed him to coach the 2015-2016 season. The evidence shows the KCBOE advertised multiple coaching vacancies for the next school year at the time the Head Coach position was available in April of 2015. J.A. at 116-118, 121. The KCBOE posted its positions as available for the 2015-2016 school year prior to the end of the 2014-2015 school year in order to provide ample time to fill the positions. Clark's position was not treated any differently than any other vacancies. His job posting was not unique.

Clark takes the possession this law was manipulated in order to force him out. Clark articulates that the KCBOE could have waited until the law changed, or could have waited until Clark was hired to become a teacher. However, Clark cannot rely retroactively on the change in WV Code 18A-3-2a that removed the requirement that employed certified professional educators be given first refusal on all coaching positions. "A statute is presumed to be prospective in its operation unless expressly made retrospective[.]" *Findley v. State Farm Mut. Auto. Ins. Co.*, 576 S.E.2d 807, 819 (W. Va. 2002); citing to W. Va. Code § 2-2-10(bb) (1998) (Repl. Vol. 2002). The Supreme Court explained this statutory provision as follows:

Applying this provision, we have understood it to mean that "the presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect." Syl. pt. 4, *Taylor v. State Compensation Commissioner*, 86 S.E.2d 114 (W. Va. 1955); Syl. pt. 1, *Loveless v. State Workmen's Comp. Comm'r*, 184 S.E.2d 127 (W. Va. 1971); Syl. pt. 2, *Conley v. Workers' Comp. Div.*, 483 S.E.2d 542 (W. Va. 1997); *State v. Bannister*, 250 S.E.2d 53, 56 (W. Va. 1978). Thus, "the general rule is that statutes are construed to operate in the future only and are not given retroactive effect unless the legislature clearly expresses its intention to make them retroactive." *Loveless*, 184 S.E.2d at 129 (citations omitted).

See *Findley v. State Farm Mut. Auto. Ins. Co.*, 576 S.E.2d at 819. As of June 12, 2015, the provision of WV Code 18A-3-2a giving hiring priority to employed certified professional educators was removed allowing county boards of education to hire coaches without offering first

refusal to the employed educators. However, the legislature made no clear expression of its intent for the new law to apply retroactively. As such, the KCBOE was required to follow the law as it stood when the position was vacant and advertised in April 2015. J.A. at 89. The removal of this provision cannot be applied retroactively as a basis to assert a discriminatory motive by the KCBOE because it “could have waited” for it to change when the position was vacant under the old law. The law that stood at the time the position became open is the law that applies and thus the KCBOE was required to follow it. W. Va. Code § 18A-3-2a(e)(3) (Effective Until June 12, 2015); *see, generally, Hanlon v. Logan County Board of Education*, 201 W. Va. 305, 496 S.E. 2d 447, at 455 (W.Va. 1997); 127 CSR 3-6.1 & 6.4.c.; *see also* WVSSAC Policy at J.A., at 205, 228.

### CONCLUSION

Mr. Clark’s own admissions provide the clear reason why the hiring committee, who abided by the law at the current time, determined the position had to first be offered to a “currently employed certified professional educator” that applied for the position. *Id*; *see also* J.A., at 92-93. While Mr. Clark speculated at trial that he deserved special treatment due to his tenure as a teacher and coach, the KCBOE had to follow the law. As stated throughout, Clark was not a “currently employed certified professional educator,” because he resigned as a teacher in October 2014 to take full retirement. *Id*; *see also* J.A., at 30, 191, 73, 196, 209-210. While Mr. Clark incorrectly opines that the Agreement gave him some expectation of employment, his own admissions completely nullify that position. Clark admits that he was not employed by the KCBOE “in any capacity” when basketball season was over and when he interviewed for the position of Head Coach of the basketball team. J.A., at 103, 210. His coaching duties ended on March 10<sup>th</sup>, 2015, long before he interviewed for the position of Head Coach on May 8<sup>th</sup>, 2015. Thus, Judge King, even when viewing the evidence in a light most favorable to Mr. Clark, granted judgment as a

matter of law to KCBOE because no evidence existed for which a jury could have found a verdict for Mr. Clark that any discriminatory animus existed. As such, there is no legally sufficient evidentiary basis for a reasonable jury to find the KCBOE discriminated against Clark on the basis of his age. *See Skaggs v. Elk Run Coal Co.* 198 W. Va. 51, 77, 479 S.E.2d 561, 587 (1996); Rule 50 of the West Virginia Rules of Civil Procedure. The Circuit Court's *Order* granting Judgment as a Matter of Law to the Kanawha County Board of Education should be affirmed.

**KANAWHA COUNTY BOARD OF  
EDUCATION,**

By Counsel,

A handwritten signature in black ink, appearing to read "Charles R. Bailey", is written over a horizontal line.

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
APPEAL NO.: 17-0616**

**CARL CLARK,**

**Petitioner,**

**v.**

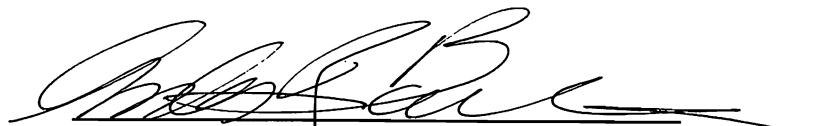
**KANAWHA COUNTY BOARD OF  
EDUCATION,**

**Respondent.**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of foregoing **"Respondent's Brief"** was served upon the following parties by U.S. Mail on this 30<sup>th</sup> day of November, 2017:

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